What is not clear is whether the FCC's current regulations and decisions implementing those regulations comport with Congressional intent.

2. The new digital SMR service concept, which even FCI touts as groundbreaking and unlike any previous SMR system, has not been "established" for 10 years.

The thesis is also inaccurate in constantly referencing a 10 year span that SMRs, and thus, implicitly MRNE's [and FCI's] services have been established. MRNE's services, as described, are indistinguishable from those authorized in the FCI proceeding. Indeed, the Bureau explicitly relies on the FCC's FCI decision to dismiss NARUC's opposition. FCI describes these new digital-type SMR service as "..a benchmark in the technical, entrepreneurial and marketplace evolution of the SMR industry.."[20]

Obviously, an inquiry like this is unnecessary unless one first assumes that interconnection is allowed.

(2) "In addition...one should carefully examine all related language in the...Act. Section 153(gg) defines a "private land mobile service" as "a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations...for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation." ...This is conceptually different from services designed to provide local access, like cellular and ESMR, where the users do not generally communicate among themselves, but rather with others over the landline network. This distinction is further supported by the express language of Section 332(c)(1), which is limited by its terms to "service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems." ...Immunity granted under Section 332...must be read in pari materia as limited to private land mobile dispatch systems."

Again the inquiry suggested here makes no sense unless one first assumes that some form of interconnection is allowed.

(3) "Other relevant factors in this analysis should include whether FCI is advertising to the general population and what percentage of FCI's ESMR airtime will be consumed in local access as opposed to dispatch."

Again, what relevance is this inquiry unless one assumes that, in certain circumstances, interconnection is allowed.

[20] See, FCI's April 22, 1992 filed "Petition for Rulemaking" at page 15. (Undocketed)

As an examination of NARUC's other pleadings [again either directly filed in or incorporated by reference in this proceeding] will demonstrate - Wall Street, the business community, and the current administration, share FCI's view that MRNE's/FCI's digital offerings are brand new and unlike previous SMR services. Both FCI and MRNE's proposals have only recently received authorization (Early 1991 for FCI [21] and April 13, 1992 for MRNE) - not 10 years ago.

3. The legality of the FCC's regulations in this area and the related cases has not yet been "established".

Finally, the thesis is inaccurate in referencing the case law/FCC regulations placed in issue by this proceeding as "established."

Most, if not all, of the FCC decisions addressing the application of Section 332 and cited in all of the oppositions, including the FCI proceeding, have not been tested in the Courts. The one case cited by FCI where the Court did address the Section 332 regulatory scheme, Telocator v. FCC, is not applicable to the current proceeding. That case dealt specifically with whether the Section 332(c)(1) interconnection restrictions APPLY to a system where "only the sole user...has control of the land station..." It found only that the FCC's interpretation of authorized user was permissible under the Act. The current proceeding concerns a completely different factual situation, i.e., with MRNE's [and FCI's] systems - individual endusers can control the station; also, in this proceeding, the focus is not whether the interconnection restrictions do apply, but instead converges on the analysis that must accompany that application.

As far as the decisions that have not been subject to judicial review, the suggestion that NARUC is inappropriately challenging "established" law is disingenuous. Although, the focus of NARUC's complaint is the FCC's application of the Section 332 "functional test" - where an appropriate analysis of that statutory standard brings into question the substantive validity of some agency rule or policy, particularly one never subjected to judicial review, that agency, of course, has the right to re-examine its policy. Moreover, the courts, to the extent that the FCC's analysis renders "...the rule or policy subject to renewed challenge on any substantive grounds" will not dismiss a coordinate challenge to the rule or policy "because of a limited statutory review period."

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[21] In Re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 (1991) ("FCI Proceeding"), recon. den. 6 FCC Rcd 6989 (1991).

See, Public Citizen v. NRC, U.S.App.D.C. Case No. 89-1017, Slip Opinion at 9-10 (April 17, 1991), and the cases cited therein. Accordingly, to the extent NARUC's arguments do call into question the substantive validity of established regulations or decisions, reexamination of those regulations is entirely appropriate.

C. The legislative history supports NARUC's views.

After spending over a third of its pleading and almost half of its argument decrying the need to examine the legislative history, FCI posits - in its section D. argument, which begins on page 11, that "the legislative history of Section 332 and Commission Precedent support the "Resale" test of private carriage."[22]

Specifically, FCI argues that "..[t]he Conference Report states that the distinction between private and common carrier land mobile services set out in the legislation is a functional one, i.e., whether or not a licensee is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering."[23] It is unclear why FCI quoted this section in its comments. In quoting this section, it would seem that FCI is agreeing that - whatever test is involved - it is a "functional one". However, other language in FCI's pleading seem to indicate this is not its position. In any case, FCI goes on to state that the Conference Report "..specif[ies] that private systems may be interconnected with the public switched telephone network..." and that "...[t]he licensee provides a private land mobile service so long as it complies with the restrictions on resale of such interconnected service."[24]

However, in paraphrasing the Conference report, FCI fails to mention that it also states -

> "... Only if a private land mobile operator... is reselling for profit interconnected common carrier services is the interconnection prohibited. **This will assure that frequencies allocated essentially for purposes of providing dispatch services are not significantly used to prove common carrier message service."** [Emphasis Added][25]

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[22] NARUC's response to the "support" provided by prior FCC precedents is discussed in Section I.B., supra.

[23] FCI Opposition at 11.

[24] Id. at 11 - 12.

[25] H.R. Report No. 97-756, 97th Congress, 2nd Session (1982) at 2300.

This section rather clearly suggests that a proper application of the interconnection prohibitions will assure that SMRs' spectrum, which was allocated, at least in Congresses' view "essentially for purposes of providing dispatch services" will not be significantly used to provide common carrier message services."[26] A fair reading of MRNE's application, particularly in light of its reliance upon the FCI Order, suggests that MRNE, like FCI, will provide/market its new services as an equivalent to cellular to individuals and provide predominately common carrier message service as opposed to dispatch type operations.

Finally, one must assume that in enacting Section 332 and defining PLMS and establishing some [even FCI's version] statutory "test" for private carriage, that Congress intended to place some limits upon the FCC's authority.[27]

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[26] Congress clearly did not intend that the section would apply to land mobile services operating functionally and predominately as common carrier, cellular-like services. Indeed, the Senate sponsors of Section 332 flatly stated that "[PLMS] does not include common carrier operations like the new cellular systems." See Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inouye upon introduction of S.929, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981) (emphasis added).

[27] See House Report at page 2300. Although the FCC maintains its exclusive radio licensing authority, "..states retain full jurisdiction to engage in the economic regulation of common carrier stations (i.e., regulation of entry, rates and practices) consistent with Sections 2(b) and 221(b) of the Communications Act of 1934 (47 U.S.C. 2(b), 221(b) (1976)) to the extent they deem it necessary in the public interest to do so." Moreover, the report goes on to note that "...the Commission may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over common carrier station. {Emphasis Added}" House Report, at page 2300. Compare, NARUC v. FCC, 533 F.2d 601, 619 (D.C.Cir 1976), where the court found that "the authority to experiment broadens the Commission's freedom to promulgate innovative and perhaps speculative regulations of activities over which it otherwise exercises regulatory jurisdiction. It does not, however, give the Commission power to regulate activities experimentally, where...{the Commission lacks general jurisdiction}".

However, as suggested by Telocator's recent request for a rulemaking in RM 7823, if the "analysis" adopted in the FCI proceeding is correct, particularly as characterized by FCI in its opposition, there are virtually no limits on the FCC's ability to "define" private carriage. The FCC could allow any current cellular carrier, through the waiver process, to provide interconnected services virtually identical to its current offerings - on a private carrier basis - by changing some of the accounting regulations. The carrier could markup airtime for access to interconnection - and just "flow through" the interconnection costs to assure compliance with the FCC's regulations, i.e., essentially engage in common carrier "resale" of telephone service, although no direct markup of telephone charges occurs.

D. NARUC has consistently opposed encroachments upon state jurisdiction to regulate radio common carriage.

In Section B. of FCI's argument, which spans pages 6 - 7, it purports to "strip" away "all surplusage" and reveal the "real truth" of NARUC's involvement in this and other cases. Specifically, FCI states:

> The real truth is that NARUC['s]...Application is a preemptory attack on the possibility that the Commission could allow some or all future Personal Communications Services (PCS) to be provided on a private carrier basis exempt from state rate and entry regulation....To attack MRNE's Waiver Filing to protect state interests in PCS matters borders upon an abuse of the Commission's processes.

It is unclear why or how attacking a filing to protect state interests in PCS matters "borders upon an abuse of the Commission's processes." Nowhere in this segment does FCI present any explanation of why such activity is abusive or cite any authority to support its conclusory observation.

First, it should be noted, that even if one assumes that NARUC is engaging in what FCI calls a "preemptory attack" to protect state regulation of common carriage in the PCS proceeding, it is an entirely proper posture/strategy for NARUC to adopt. Indeed, the circumstances presented compel NARUC to take action in these proceedings.

FCI's argument clearly indicates its belief that the FCC's analysis of the Section 332 test in the FCI proceeding, this case, and all the cases cited for support by those opposing NARUC in this and the FCI proceeding, have no application to, and should not be cited as precedential for, any determinations of private carriage in the PCN proceeding. NARUC agrees wholeheartedly with that assessment.

Unfortunately, however, IF the FCC chooses to designate some PCN providers as private carriers under section 332, others may disagree with FCI's position, i.e., some parties - that support the application of private carrier status to PCN systems - could (i) cite the MRNE and FCI proceedings, as well as the other authorities cited by NARUC's opponents in this case, (ii) urge the application of the "analysis" presented in those cases, and (iii) adopt the same posture FCI's presents in this case, i.e., NARUC's arguments have already been considered in earlier cases, etc. NARUC views with skepticism the suggestion inherent in FCI's argument that the FCC and all the participants in the PCN proceeding will treat the proper interpretation of Section 332 as res nova.

In addition to the novel suggestion that states/NARUC adopt a somewhat foolhardy attitude towards protecting their interests, FCI's argument is also internally inconsistent. While researching the response to this "argument", NARUC discovered that, coincidentally, in November, 1990 - long before NARUC filed its first supposed "preemptory attack" upon FCI's proposal in April of 1991, presumably to protect its interests in the PCN proceeding, FCI and the American SMR Network Association, Inc., filed separate comments in the PCN proceeding alleging that SMR operations, particularly trunked SMR systems like those operated by FCI, ALREADY QUALIFY AS PCS systems.[28]

Thus, by FCI's own statements and logic - in this proceeding we would be preventing a self-defined PCN provider from gaining private carrier status - not "preemptively" attacking that status for a future proceeding.

Secondly, FCI's "argument" that such activity is "abusive" is based upon an inaccurate assumption that NARUC is joining in these two proceedings solely to protect its jurisdiction-based prerogative to regulate common carrier service. As FCI well knows, NARUC, and its members, have a long history of raising the very issues arising in this case.

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[28] See, FCI Comments at 5. and American SMR Network Association, Inc. Comments at 2, filed in the proceeding titled: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 [RM-7140/7175]. Curiously, in a May 4, 1992 "Request for a Pioneers Preference" also filed in the PCN proceeding, FCI seeks to gain such a preference for its recently approved enhanced SMR system and, in note 14 [page 8], in spite of its vociferous defense of private status in this [and its own ESMR waiver] proceeding - suggests that it "...is not taking a position in this...request whether PCS should be private or common carriage..." and goes further to state that "...[o]f course, Fleet Call would provide the service in accordance with either regulatory scheme."

Indeed, according to FCI, in another part of its pleading of course, NARUC has, for over 15 years, been remarkably consistent in opposing the SMR private carrier structure.[29] NARUC's, and its members', participation in cases ranging from 15 years ago to the present were not, and are not, premised solely on any activity in the PCS proceeding. An examination of NARUC's recent resolution, quoted out of context in FCI's argument, demonstrates this continued commitment. The resolution, which was passed after NARUC was involved in the FCI, MRNE and other proceedings, "...continues to oppose the FCC's current interpretation of the "private carriage" standard as applied in the Fleet Call proceeding, because of the FCC's failure to apply the "functional test" ...as required under Section 332," and, looking further, pointedly suggests that future application either in the PCN proceeding or other proceedings involving "...wireless common carrier services", e.g., cellular, enhanced SMR, etc." The complete text of the resolution is attached - **Resolution Regarding Preemption of State Regulation of Wireless Common Carrier Services,** NARUC Bulletin, No. 10-1992, pp. 8-9.

Finally, in Section A. of its opposition, FCI suggests that NARUC's application provides no basis for review. To support its argument, FCI provides the Commission with two conclusory statements, one mischaracterization of NARUC's argument,[30] and an argument that, NARUC's opposition/review application should be dismissed apparently because NARUC purportedly has made the same jurisdictional arguments in several proceedings. This particular suggestion is difficult to understand when one considers that NARUC's arguments in the three proceedings cited were never/have not been addressed with any specificity and have not, as yet, been subjected to judicial review. In the FCI proceeding, NARUC's arguments were never reached - or addressed with any specificity - because the FCC decided to dismiss NARUC on procedural grounds. The PCN and Telocator proceedings are still pending, and, obviously, NARUC is seeking review in this docket.

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[29] "NARUC's arguments in this proceeding demonstrate that more than 15 years later, and despite clear statutory prescription and Court mandates, it still does not accept the private carrier SMR regulatory structure." FCI Opposition at 8, note 17.

[30] Compare, footnote 5 of FCI's opposition with the discussion of interconnection, supra.

II. RESPONSES TO REMAINING ARGUMENTS POSITED BY OTHER PARTIES.

A. Because (i) MRNE's application is strikingly similar to FCI's proposal, (ii) the Bureau adopted without further discussion the FCC's Section 332 analysis from the FCI proceeding, and (iii) the factual aftermath of the FCI proceeding demonstrates the inadequacy of the FCC's analysis, discussions of the circumstances of FCI's operations remain relevant.

In the FCI Proceeding, the FCC ignored parties urging the propriety of rulemaking procedures, in spite of the fact that the issue raised both in that case and in the instant docket has direct impacts on state jurisdiction. Predictably, several parties, including MRNE suggested that "...NARUC['s] Application...is in reality a late-filed reconsideration request of the Fleet Call waiver". See MRNE's Opposition at 3. As NARUC noted in the subject application the factual aftermath of the FCC's analysis in the FCI proceeding presents compelling evidence of the inadequacy of the approach adopted in that case.

Accordingly, considering that the Bureau has eschewed any discussion of Section 332 - preferring instead to rely upon the Commission's opinion in the FCI proceeding - discussions of and references to the FCI proceeding are, and remain, particularly apropos.

B. An examination of the perceptions of potential users of MRNE's proposed new service is relevant to making the determination of whether MRNE's proposed new service will use spectrum allocated "essentially for purposes of providing dispatch services" will be used predominately to provide common carrier message services.

On page 10 of its opposition, MRNE suggests that "NARUC is attempting to foist upon the Commission a new test of common carriage. This new test..asserts that the services are functionally indistinguishable to the consumer."

NARUC's proposal in its request for review is not "new". Moreover, like some earlier addressed FCI contentions, MRNE argument takes the discussion in the footnote out of context. In text of pleadings filed in 1991 in the FCI proceeding, and incorporated by reference into this proceeding, NARUC suggested that, as part of the inquiry under the "functional test" required by the statute to assure, inter alia, that the SMR provider was not engaged in resale and not using spectrum allocated for dispatch predominately for common carrier message service - that an analysis consumer perspective is an important and relevant component of any functional analysis.[31] In the very footnote containing the purported new test, NARUC again discussed the perceptions of these new digital SMR offerings from several different perspectives. Indeed, a fair reading of all the quotes and actions cited in all of NARUC's filings both filed in, and incorporated by reference in, this proceeding - suggests that not only will potential users of the new system view it as "functionally equivalent" to common carrier service, but that industry, Wall Street, and FCI already view these proposed services as the functional equivalent of common carrier message services.

II. CONCLUSION

For the foregoing reasons, NARUC respectfully requests that the Commission (i) reject the arguments of FCI and the others filing oppositions to NARUC's request and (ii) overrule the Bureau's Letter Ruling and reject MRNE's request for waivers.

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[31] Compare, note 10, supra, with note 3 of NARUC's application for review.

APPENDIX D - SMR END-USER LICENSING PROCEEDING

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Eliminate
Separate Licensing of End Users
of Specialized Mobile Radio Systems

PR Docket No. 92-79

NARUC'S JUNE 9, 1992 INITIAL COMMENTS

NARUC'S JUNE 9, 1992 INITIAL COMMENTS

Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.49, 1.415, and 1.419 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments addressing the Commission's Notice of Proposed Rule Making ("NPRM"), [FCC 92-172], as released May 5, 1992, in the above-captioned proceeding:

I. NARUC'S INTEREST

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its member's include those governmental bodies of the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of carriers and utilities.

NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. Specifically, NARUC is composed of the State officials charged with the duty of regulating telecommunications common carriers within their respective borders. As such, they have the obligation to assure those telecommunications services and facilities required by the public convenience and necessity are established, and that service is furnished at rates that are just and reasonable.

NARUC supports the FCC's desire to encourage larger and more efficient use of radio in the public interest. Indeed, in a recent resolution, NARUC specifically encouraged the FCC to, THROUGH APPROPRIATE PROCEDURES, provide additional competition to cellular systems via SMR systems.[32]

However, as that resolution indicates, NARUC is concerned that certain Specialized Mobile Radio ("SMR") services currently authorized by the Commission in other related dockets, e.g., Fleet Call Inc.'s ("FCI") Enhanced SMR service, Mobile Radio New England's ("MRNE") recently authorized digital offerings, etc., involve common carriage and therefore are subject to State regulatory authority.[33]

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[32] See, NARUC's March 4, 1992 "Resolution Regarding Preemption of State Regulation of Wireless Common Carrier Services", Reported NARUC Bulletin, No. 10-1992, pp. 8-9.

[33] See, 47 U.S.C. Section 331(c)(3); Memorandum Opinion and Order ("FCI Order"), In re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, released March 14, 1991, 6 FCC Rcd 1533 (adopted February 13, 1991)(FCC 91-56), reconsideration

These recent orders maintain these SMR services' status as a private land mobile radio. Thus, although States may regulate cellular common carriers, the States are preempted from regulating provision of what appears to be a "functionally equivalent" service.

The FCC's proposal in this proceeding eliminates end user licensing requirements on SMR carriers. As its previous filings in the two listed proceedings indicate, NARUC argued that this requirement is not relevant to any statutory analysis distinguishing between private and common carrier radio services. However, the FCC's private carrier findings in the proceedings cited above rely almost exclusively on the few small remaining distinctions in the regulations, including the end user licensing requirement.

Accordingly, in light of the FCC's findings and proposals in (i) the FCI and MRNE proceedings, and (ii) other recent and related dockets, NARUC believes the Commission should carefully examine whether the elimination of this requirement, under its own analysis, effectively eliminates "the private carrier status of Specialized Mobile Radio Licensees." NPRM at 2, n. 11. At a minimum, if the Commission eliminates end-user licensing, it must consider whether that removal requires the reopening of the Fleet Call, Mobile Radio New England, and related proceedings based upon these changed circumstances.

II. BACKGROUND

Specialized Mobile Radio ("SMR") was initially classified by the Commission as a private radio service. NARUC unsuccessfully appealed this classification asserting, inter alia, that such service constituted common carriage subject to state regulation. Subsequently, in 1982, Congress enacted Section 332(c)(1) to provide a "...clear demarcation between private and common carrier land mobile services."[34].

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denied, 6 FCC Rcd 6989 (1991); Letter No. 7320-12 (April 13, 1992), In the Matter of Mobile Radio New England Request for Waiver, File No. LMK-91260.

[34] House Conference Report No. 97-765, Joint Explanatory Statement of the Committee of Conference on P.L. 97-259, The Communications Amendments Act ("House Report"), 97th Cong., 2nd Sess. 54, reprinted in, 3 U.S. Code Cong. & Ad.News '82 Bd.Vol., at pages 2237, 2298 (1983).

According to the conference report "...[t]he basic distinction...is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is ...a common carrier."[35]

Significantly, in that report, the conferees also note that, although the FCC maintains its exclusive radio licensing authority, "..states retain full jurisdiction to engage in the economic regulation of common carrier stations (i.e., regulation of entry, rates and practices)...to the extent they deem it necessary...to do so." Moreover, the report goes on to note that "...the Commission may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over common carrier station. {Emphasis Added}"[36]

It is significant that at the time of both the Court of Appeals decision and the 1982 amendment, the SMR regulatory scheme promulgated by the Commission was significantly more restrictive. Since 1982, the Commission has fundamentally changed the character of its SMR regulation.[37] These changes significantly eroded the distinction between SMR services and certain common carrier services while maintaining inconsistent regulatory schemes.

Most recently, on February 13, 1991, NARUC believes the Commission eliminated any remaining significant distinctions when it granted FCI authority to deploy a proposed "Enhanced" SMR Service. This ESMR service radically diverges from the historical SMR concept in both architecture and purpose - clearly moving any carrier providing such service from within the statutory definition of common carrier.

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35 House Report, at 2237, 2298.

36 Id. at 2300.

37 For example, even before this proceeding, end user eligibility requirements were virtually eliminated. Amendment of Part 90, Subparts M and S, of the Commissions's Rules, PR Docket No. 86-404, Report and Order, 3 FCC Rcd. 1838, 1839-42, Paragraphs 15-35 (1988). The Commission disavowed the channel recovery program. Id. at page 1845, paragraph 64. Liberal interconnection is now allowed. See, Amendment of Parts 89, 91, 93, and 95 of the Commission's Rules to Prescribe Polices and Regulations to Govern Interconnection of Private Land Mobile Radio Systems with the Public Switched, Telephone Network, Docket No. 20846, First Report and Order, 69 FCC 2d 1831 (1978); Second Report and Order, 89 FCC 2d 741 (1982); and Memorandum Opinion and Order, 93 FCC 2d 1111 (1983).

According to FCI's application, it will (i) be based on multiple low-power cells, exclusive frequency assignments and service area-oriented interference protection, (ii) be designed for frequency reuse, (iii) concentrate on communications between multiple mobile units in discrete "cellular-based" service areas, (iv) feature automatic call handoff among cells, and (v) expand its range of services considerably beyond dispatch to target and compete for cellular-type mobile data communications and interconnected mobile telephone service.

Moreover, it is apparent that the FCC will continue to rely on the "FCI" analysis of Section 332 to distinguish between private and common carriage. See, for example, the Private Radio Bureau's recent Letter Orders 7320-12 & 7300-01 in FCC File No. LMK-91260, granting MRNE's request for authority to provide a service functionally equivalent to FCI's ESMR - while eschewing any discussion of Section 332 and instead relying upon the Commission's opinion in the FCI proceeding. As a practical matter, this interpretation allows the FCC to define private carrier status in any fashion as long as its regulations assure that the subject carriers's bills to subscribers do not expressly mark up telephone charges.

Since the FCC's FCI Order, NARUC has argued at some length in three separate proceedings, that, at the very least, the FCC's authorization of FCI's ESMR and similar services moves those offerings out of the private carriage category.

III. DISCUSSION

Congress specifically differentiated between private carrier services and cellular service when it enacted Section 332. The Senate sponsors of the legislation pointed out that private land mobile carriers do "not include common carrier operations like the new cellular systems."[38]

The purpose behind the interconnection restrictions is to "assure that [private carrier] frequencies allocated essentially ...[to]...provid[e] dispatch services are not significantly used to provide common carrier message service [like cellular]."[39]

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[38] See, Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inoye upon introduction of S. 929, April 8, 1981, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981).

[39] H.R. Rep. No. 76, 97th Cong., 2d. Sess. 56, reprinted in 1981 U.S.Code Cong. and Ad. News, 2261, 2300.

In NARUC's view, the Commission's current interpretation of the Section 332 test, as exemplified in the FCI proceeding, defies Congressional intent and is legally untenable. Indeed, NARUC recently argued in the still pending MRNE proceedings, that the factual aftermath of the FCC's analysis in the FCI proceeding, including the instant NPRM, presents compelling evidence of the inadequacy of the approach adopted in that case - suggesting, in light of the "changed circumstances", that a petition to reopen the record in that proceeding might be appropriate.

The record in the Fleet Call proceeding, which purportedly contains substantial evidence supporting the FCC's "analysis" of the Section 332 private vs. common carrier test and related conclusions, relies heavily upon the existence of end user licensing.

For example, in the FCI proceeding, FCI argued that "ESMR differs both functionally and technically from cellular technology in several critical ways."[40] As support for this proposition, FCI claimed, inter alia, that "ESMR, like other SMR systems, will serve only licensed, eligible end users" - specifically arguing that "...[t]o the extent that ESMR succeeds in attracting customers away from cellular systems, it will not be because they see ESMR as a functional equivalent to cellular .... They would not ... endure the burden of end user licensing, which is not part of cellular...service..." [Emphasis Added][41]

Accordingly, NARUC believes that if the FCC determines to eliminate the end-user licensing requirements in this docket, at a minimum, it must examine the impact of that decision upon the private carrier status in both the FCI and MRNE proceedings. NARUC urges the FCC to use this proceeding to comprehensively reassess its application of the private carriage standard and promote balanced treatment for all services by assuring that states retain the authority to regulate, when circumstances require, all entities providing "common carrier type" services within their respective jurisdictions.

II. CONCLUSION

In light of the FCC's findings and proposals in (i) the FCI and MRNE proceedings, and (ii) other recent and related dockets, the FCC should carefully examine whether the elimination of the end user licensing requirement, under its own analysis - as exemplified in the FCI order, effectively eliminates private carrier status for SMR carriers.

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[40] FCI Reply Comments in File No. LMK 90036, at 11.

[41] FCI Waiver Request in File No. LMK 90036, at 36.

At a minimum, if the FCC removes the end-user requirements, the FCC should reopen the Fleet Call, Mobile Radio New England, and related proceedings and re-evaluate its "private carrier" findings based upon these changed circumstances.

In addition, to assure an adequate record on which to base a decision in this proceeding, NARUC respectfully requests that the FCC incorporate NARUC's pleadings in the Fleet Call and Mobile Radio New England proceedings cited above into the record in this proceeding. If the Commission indicates it is necessary, NARUC will be pleased to refile duplicate copies.

Moreover, NARUC encourages the Commission to open a proceeding to reclassify spectrum or use some other reasonable and legal method/procedure to allow systems like MRNE, FCI and others to provide competition to cellular service without having a preemptive effect on State regulation.

APPENDIX E - THE DIAL PAGE PROCEEDING

In the Matter of the Request of

DIAL PAGE, L.P.

To Waive Sections
90.621(a)(iv), 90.621(b), 90.627, 90.631(e) and 90.631(f)
of the Commission's Rules to Operate
a Wide Area 800 MHz Digital Trunked SMR

CASE NUMBER 92143

NARUC'S OCTOBER 16, 1992 INITIAL COMMENTS

NARUC'S OCTOBER 16, 1992 INITIAL COMMENTS

Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.49, 1.415, and 1.419 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments addressing the June 22, 1992 "Request for Rule Waiver" ("Request") filed by Dial Page, L.P. ("DP" or "Petitioner") in the above-captioned proceeding [Public Notice, 57 Fed. Reg. 39684 (September 1, 1992):

I. NARUC'S INTEREST

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its member's include those governmental bodies of the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of carriers and utilities.

NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. Specifically, NARUC is composed of the State officials charged with the duty of regulating telecommunications common carriers within their respective borders. As such, they have the obligation to assure those telecommunications services and facilities required by the public convenience and necessity are established, and that service is furnished at rates that are just and reasonable.

NARUC supports the FCC's desire to encourage larger and more efficient use of radio in the public interest. Indeed, in a recent resolution, NARUC specifically encouraged the FCC to, THROUGH APPROPRIATE PROCEDURES, provide additional competition to cellular systems via SMR systems. See, NARUC's March 4, 1992 "**Resolution Regarding Preemption of State Regulation of Wireless Common Carrier Services**", Reported NARUC Bulletin, No. 10-1992, pp. 8-9.

However, as that resolution indicates, NARUC is concerned that certain Specialized Mobile Radio ("SMR") services currently authorized by the Commission in other related dockets, e.g., Fleet Call Inc.'s ("FCI") Enhanced SMR service, Mobile Radio New England's ("MRNE") recently authorized digital offerings, etc., involve common carriage and therefore must be subject to State regulation should the specific states involved determine such regulation is necessary. See, 47 U.S.C. Section 331(c)(3); Memorandum Opinion and Order ("FCI Order"), In re Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, released March 14, 1991, 6 FCC Rcd 1533 (adopted February 13, 1991)(FCC 91-56), reconsideration denied, 6 FCC Rcd 6989 (1991); Letter No. 7320-12 (April 13, 1992), In the Matter of Mobile Radio New England Request for Waiver, File No. LMK-91260.

These recent orders maintain these SMR services' status as a private land mobile radio. Thus, although States can regulate cellular common carriers, the States are preempted from regulating provision of what appears to be a functionally equivalent service.

DP's application relies heavily upon the Commission's actions in the previously cited orders and appears to contain the same deficits found in both FCI's and MRNE's applications.

II. DISCUSSION

A. DP's proposal does not provide enough detail for FCC action.

DP's proposal lacks sufficient detail for the Commission to take action. The Request notes, at page 9, with very little additional description, that DP plans to "offer a myriad of improved services to its customers...Initial system plans include high capacity...mobile telephone service..."

Other sections of the Request rather clearly suggest that - at least the proposed mobile service - may well fall outside the range of services allowable for private carriers under Section 332 of the Communications Act. For example, later in the Request, DP notes that fifty-four percent of its current customer base also currently subscribe to common carrier cellular service. DP expects to "convert" a significant percentage of those "cellular users" to "digital SMR" - purportedly a private carriage service. See, Request at pages 11 -12. In the absence of additional information, it appears that the FCC will be unable to assess whether the resulting services will remain "private" under Section 332's functional test.

Congress specifically differentiated between private carrier services and cellular service when it enacted Section 332. The Senate sponsors of the legislation pointed out that private land mobile carriers do "not include common carrier operations like the new cellular systems." See, Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inoye upon introduction of S. 929, April 8, 1981, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981).

The purpose behind the interconnection restrictions is to "assure that [private carrier] frequencies allocated essentially for purposes of providing dispatch services are not significantly used to provide common carrier message service [like cellular]." H.R. Rep. No. 76, 97th Cong., 2d. Sess. 56, reprinted in 1981 U.S.Code Cong. and Ad. News, 2261, 2300.

As discussed below, in NARUC's view, the Commission's current interpretation of the Section 332 test, as exemplified in the FCI and MRNE proceedings, obliterates Congressional intent. Indeed, NARUC recently argued in the still pending MRNE proceedings, that the factual aftermath of the FCC's analysis in the FCI proceeding, presents compelling evidence of the inadequacy of the approach adopted in that case - suggesting, in light of the "changed circumstances", that a petition to reopen the record in that proceeding might be appropriate. Such prospects have become even more apropos in the aftermath of the Commission's recent order lifting the enduser licensing requirements from SMR carriers. Indeed, recently, Commissioner Duggan suggested "given the growing convergence between cellular and private land mobile radio services, I think it may be time to explore the notion of a "Mobile Services Bureau," accommodating not only current services but new ones also, like PCS." See "Duggan Urges Next Administration to Abandon Pretense and Make Good Industrial Policy", Telecommunications Reports, September 28, 1992 edition, at pages 4 - 5.

B. A Section 90.151 waiver application is not the appropriate procedural vehicle to address DP's requests.

DP's request, like FCI's, changes the basic nature of SMR service and further blurs the distinctions between private and common carrier offerings. The striking similarities to the FCI and MRNE waiver proceeding, both cited in DP's Request, the likelihood of similar requests by other SMR providers, and the obstacles such waiver grants impose to an appropriate application of the Section 332 "functional" test, legitimize all the arguments presented in the FCI proceeding intoning that a Section 90.151 waiver application is not the appropriate procedural vehicle to address such requests. Additionally, NARUC believes that granting the proposed waivers exceeds the limits on Commission discretion delineated in the jurisprudence and its own regulations. See, generally, 47 C.F.R. Section 90.151, which requires a showing that "unique circumstances are involved" and WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Cir 1969), which suggests that waivers should be granted in only those limited circumstances when the policy behind the rule to be waived would not be harmed, or may perhaps be even furthered, by its non-application. Waiver proceedings were not meant to be used for drastic and wholesale changes of the regulations in place which depart from prior policies. Here, as in FCI, the effect of granting this request is a significant departure from long-standing Commission rules. If, under the functional test, these new services are, in fact, common carriage, then the FCC cannot reallocate this "private carrier" spectrum without a proper rulemaking proceeding, i.e., there is no legal basis for granting the waivers.

C. To the extent DP's proposed nondescript "mobile service" actually involves Common Carriage, grant of any waivers will be improperly based upon a misapplication of the Section 332 "FUNCTIONAL TEST".

Because of the lack of specificity concerning the nature of the services intended and DP's reliance on, inter alia, the FCI order as justification for granting its waivers, NARUC is concerned that some of the "improved" services DP intends to offer may in fact be common carrier service subject to state regulation. Without additional information concerning the proposed services, if the FCC grants these waiver requests and allows DP to maintain its "private carrier" status, it will be implicitly based upon an application of Section 332's functional test, as applied in the FCI proceeding, to the proposed "improved" services. As NARUC has explained at some length in the pleadings filed in the FCI proceeding, the FCC's current interpretation and application of that test impermissibly blurs the [few remaining] distinctions between private and common carrier status.[42]

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[42] See, 47 U.S.C. Sections 331(c)(3) & 332 (1990) and "{NARUC's} April 15, 1991 Petition for Reconsideration", May 10, 1991 Reply to Oppositions, and May 29, 1991 Errata, filed in File No. LMK-90036 and addressing the FCC's Memorandum Opinion and Order, In re Request of Fleet Call, Inc., 6 FCC Rcd 1533 (2/13/91)(FCC 91-56). See also, NARUC's January 2, 1992 Comments, May 8, 1992 Reply to Opposition, and April 10, 1992 Application for Review of Private Radio Bureau Letter No. 7320-12 filed "In the Matter of Mobile Radio New England Request for Waiver," File No. LMK 91260 responding to the Bureau's "Memorandum Opinion and Order", Adopted November 18, 1991 (DA91-1454) and subsequent letter rulings rejecting NARUC's arguments. NARUC RESPECTFULLY REQUESTS THAT THOSE DOCUMENTS FILED IN THE FCI AND MRNE PROCEEDINGS, as well as its pleading in PR Docket 92-78 BE INCORPORATED BY REFERENCE INTO THE CURRENT PROCEEDING. If necessary, NARUC will be happy to file duplicate copies with the Bureau. In examining the FCC's application of the Section 332 test in FCI, a decision that has already been cited, with little additional discussion, as authority for granting subsequent similar petitions, it is important to consider, e.g., (i) FCI's view of its operations - FCI's October 18, 1991 filed Form S-1 Registration Statement Under the Securities Act of 1933, Registration No. 33-43415, which states that "....[a]s a result of the FCC decision and recent advances in technology, the Company believes it has the opportunity to position itself as the third major provider of mobile telephone services in Los Angeles, San Francisco, New York, Chicago, Dallas and Houston, competing directly with cellular operations..." Emphasis Added. It is also important to note, that having a third "cellular" carrier in a market is desirable from NARUC's viewpoint; however, it does raise many issues of public policy, particularly if states' ability to

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impose regulations is limited to only two of the market participants; See also the March 16, 1992 "Mobile Insider's FastFax" (BIA publication), stating "Now it can be told...Wall Street sensed it two years ago...The mobile industry knew it because operators could read between the lines..." and quoting FCI's Chairman O'Brien as stating that its network will "go head to head with McCaw [a cellular provider] to serve the same customers"; (ii) the Administration's view of FCI's operations - Remarks of then Assistant Secretary of Commerce for Communications and Information, Janice Obuchowski, at the Donaldson, Lufkin & Jenrette Cellular Conference at the Waldorf-Astoria Hotel on June 20, 1991, noting that "...More controversial, of course, is the FCC's recent decision to allow Fleet Call to offer a cellular-type service (enhanced SMR) in six large urban markets using bandwidth currently allocated to it for private radio dispatch services." "Spectrum Management Reform: What's Good for America is Good for American Business" Text at page 8. (For text copies, call Ms. Doherty at 202-337-1551), (iii) the business community's view of FCI's, and other SMRs', operations: "Suddenly a license to run a taxi dispatch service is a ticket to get into the cellular business... Fleet Call owns rights to broadcast voice and data over radio frequencies reserved for taxicab dispatchers in New York, Chicago,...As such , it is a potential competitor to the country's high-flying cellular telephone operators...Lining up behind Fleet Call with their eyes on the public equity trough are other dispatchers. "The taxicab as phone company", Gary Slutsker, Forbes, 1/6/92.

FCI's - and, based upon the limited information provided, apparently MRNE's and DP's - fully interconnected systems, which will hand-off a user's conversation as the user passes from one cell to another, are functionally indistinguishable from true cellular. Even before the FCC's FCI decision, when asked how FCI's system could differ from true cellular, FCI's Vice President Jack Markell was quoted in an industry publication as responding "..[t]here are four major differences: (1) ESMR will not have nationwide roaming, (2) ESMR will have less spectrum, (3) ESMR will have user licensing, cellular does not, and (4) ESMR will offer dispatch service, cellular does not."Fleet Call to Invest 500 Million in New SMR System, NABER's SMR Letter, May 1990 at 2. In making any rational sort of "functional" analysis, these distinctions are of little if any significance - such systems are the functional equivalent of cellular service - indeed, as the remarks quoted above and in earlier filings in the FCI Proceeding demonstrate, not only do industry, Wall Street, and Administration officials seem to agree about the functional equivalency of these new enhanced services, but FCI itself is obviously pushing and relying on that "cellular" perception as the basis for its marketing and financing plans - as DP evidentially is also in "converting" current cellular users. The amount of spectrum used and the fact that ESMR can offer dispatch service are of no

Such action removes, in spite of the clear dictates and legislative history of both Sections 332 and 152(b) of the Communications Act, the state discretion to ensure that such new offerings provide the best, most efficient service to the public under reasonable rates, terms and conditions. Thus, this order not only raises serious questions under the Communications Act but also overlooks the well-established interests of the states in retaining jurisdiction over such services.

Presumably, in enacting Section 332, Congress intended to place some limits on the FCC's ability to create private carrier services.

NARUC believes, inter alia, that limitation includes a requirement that spectrum allocated for "dispatch-type services" not be used to provide an interconnected telephone service that is functionally equivalent to common carrier cellular service.

Under the FCC's current interpretation of Section 332, the Commission can define any service as private through an appropriate manipulation of accounting regulations to "assure" that interconnected service "is not being resold" for a profit.

III. CONCLUSION

For the foregoing reasons, NARUC respectfully requests the Commission to reject DP's Request for Waiver.

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interest or consequence to a user looking for mobile telephone service. The Commission has recently eliminated the enduser licensing requirement, a process which, even before the change, was only a simple, perfunctory process allowing the end user to begin using the service the day he subscribed, without awaiting issuance of the license. See 47 C.F.R. Section 90.657 (1991). The only distinction of any, albeit minimum, significance is the supposed lack of nationwide roaming. Not surprisingly, on February 26, 1992, FCI issued a three page press release announcing it had "joined the Digital Mobile Network Roaming Consortium... formed in late January by a group of major...SMR..operators who intend to install advanced digital radio systems and offer compatible mobile communications services on a nationwide basis... Customers on any system managed by a member of this consortium will learn to expect high quality service practically anywhere they go." In the long term, DP could be expected to join the same or a similar roaming consortium.

In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services

GEN Docket No. 90-314

CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing was sent by first class United States mail, postage prepaid, to all parties on the attached Service List.

James Bradford Ramsay
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners

November 9, 1992

In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services

GEN Docket No. 90-314

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